STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE LEE BROOKS,

Defendant-Appellant.

UNPUBLISHED
February 22, 2005

No. 249021
Muskegon Circuit Court
LC No. 02-048156-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, for which he was sentenced as a second-offense habitual offender to 19 to 40 years' imprisonment; possession of a firearm by a person convicted of a felony, MCL 750.224f, for which he received 1 to 7 years' imprisonment; possession of a firearm during the commission of a felony, MCL 750.227b, for which he received two years' imprisonment; and carrying a concealed weapon, MCL 750.227, for which he received 1 to 7 years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first asserts that the trial court erred in denying his request that the jury be instructed on self-defense. We disagree. A claim of self-defense is founded on necessity, real or apparent. *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). Thus, "[s]elf-defense requires both an honest and reasonable belief that the defendant's life was in imminent danger or that there was a threat of serious bodily harm." *People v George*, 213 Mich App 632, 634; 540 NW2d 487 (1995) (citations omitted). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993) (citations omitted). The instruction is appropriately given so long as there is some evidence to support the theory and, once given, the sufficiency of the theory is for the jury to decide. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978).

We review de novo claims of instructional error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). As our Supreme Court stated in *Riddle, supra* at 124-125:

> A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. When a defendant requests a jury instruction on a theory or defense that is supported by the evidence, the trial court must give the instruction. However, if an applicable instruction was not given, the defendant bears the burden of establishing that the trial court's failure to give the requested instruction

> resulted in a miscarriage of justice. The defendant's conviction will not be reversed unless, after examining the nature of the error in light of the weight and strength of the untainted evidence, it affirmatively appears that it is more probable than not that the error was outcome determinative. [Citations omitted.]

Assuming without deciding that the trial court erred by failing to instruct the jury on self defense, we conclude that such error if it occurred was not outcome determinative. The shooting in the present case occurred outside a market in the course of a struggle between defendant and the victim, Antonio Gordon. At trial, Gordon testified that he believed he initiated the struggle by grabbing defendant, and that he threw the first punch and hit defendant in the mouth. Dwight Jones, who lives next to the market and saw the incident, testified that he saw the person who was shot reach into the shooter's pocket, stating that it appeared to him that the victim was attempting to rob the shooter and that it seemed as though he was attempting to "rip" the shooter's pocket off. Detective Mario Sain testified that defendant told him during a police interview that Gordon had followed him out of the store, told him that he had a gun and, thereafter, spun defendant around by his shoulders and punched him with a handgun, after which defendant heard shots. Sergeant Cliff Johnson, who was also present for the interview, testified that defendant stated during the interview that Gordon told him that he had a gun, that Gordon hit him from behind with a gun and that, after a struggle, defendant heard shots. Defendant did not testify, and the testimony regarding his statements during the police interview does not expressly reveal defendant's state of mind at the time of the shooting.

The record fails to establish a miscarriage of justice. Because defendant's statement to the police was the only evidence in the record to establish that Gordon had and shot a gun at defendant, the weight and the strength of the untainted evidence fails to affirmatively show that it is more probable than not the jury would have reach a different result had they been instructed on self-defense.

Defendant next asserts that the trial court erroneously denied his motion for a new trial based on its determination that defendant's trial counsel was not ineffective for failing to request that the jury be instructed on provocation. We disagree. A trial court's decision as to whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. We review the trial court's findings of fact for clear error and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) (citations omitted). In order to prevail on his claim of ineffective assistance of counsel, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). The second prong, prejudice, requires that defendant demonstrate a probability of a different outcome sufficient to undermine the confidence in the outcome that actually resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant contends that had his trial counsel requested the provocation instruction and the jury determined that he was adequately provoked, he could not have been convicted of

assault with intent to commit murder. This Court has held that "if a defendant would have been guilty of manslaughter had the assault resulted in death (due to an absence of malice), there can be no conviction of assault with intent to murder." *People v Lipps*, 167 Mich App 99, 106; 421 NW2d 586 (citations omitted). The elements of voluntary manslaughter are (1) that the defendant killed in the heat of passion, (2) that the passion was caused by adequate provocation, and (3) there was not a lapse of time during which a reasonable person could have controlled his passions. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). It is the element of provocation that distinguishes manslaughter from murder. *Id.* The degree of provocation required to mitigate a homicide from murder to manslaughter "is that which causes the defendant to act out of passion rather than reason." *Id.* In order for the provocation to be adequate, it must be "that which would cause a *reasonable person* to lose control." *Id*. (emphasis in opinion). "The determination of what is reasonable provocation is a question of fact for the factfinder." *Id*.

During a *Ginther*[1] hearing, trial counsel testified that he did not request a provocation instruction because in his judgment, the instruction did not fit with the pattern of evidence presented. In particular, trial counsel noted that there was no particular evidence of defendant's emotional state at the time of the shooting despite the fact that the victim had been shot four times. Moreover, trial counsel testified that after consultation with defendant, his trial strategy was to seek conviction of a lesser included offense or a not guilty verdict. Because trial counsel accurately recognized that there was no direct evidence of defendant's state of mind, and that any inferences to be drawn about defendant's state of mind from defendant's statements to the police were inconsistent with his trial strategy to persuade the jury that defendant did not shoot the victim, we conclude defendant has failed to show that trial counsel was objectively unreasonable in failing to request an instruction to the jury regarding provocation. In addition, because any evidence of defendant's state of mind is weak at best, defendant also fails to show that the outcome would have been different had the instruction been requested and given.

Defendant next asserts that the trial court abused its discretion by rejecting his agreement to stipulate that he had been previously convicted of possession with intent to deliver marijuana, and overruling his objection to the introduction of evidence by the prosecution about his arrest and conviction of this charge. We agree. In *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997), this Court, citing *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 L Ed 2d 574 (1997), concluded that where a defendant offered to concede the fact of a prior conviction, admission of evidence beyond such a stipulation may constitute prejudicial error. In *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997), this Court, relying on the authority of *Old Chief*, concluded that where the defendant was being tried on the charge of felon in possession of a firearm, the trial court erred by rejecting defendant's stipulation that he had committed felonious assault, and instead permitting the prosecution to inform the jury that defendant had been previously convicted of assault with a dangerous weapon.

In this case, in order to prove defendant's guilt of felon in possession of a firearm, the prosecution in part had to prove beyond a reasonable doubt that defendant had been convicted of a " "specified felony" i.e., . . . a felony in which . . . [a]n element of that felony is the unlawful

[1] *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973)

manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance." MCL 750.224f(6)(ii). The testimony offered by the prosecution detailing the circumstances of defendant's arrest, including the facts that the arresting officer was responding to a narcotics complaint, that the defendant had slurred speech and bags of marijuana in his mouth, and that defendant admitted he possessed the marijuana with the intent to deliver it, were irrelevant and thus lacked probative value as to the charged offense of felon in possession of a firearm. Nevertheless, in light of the otherwise overwhelming evidence presented against defendant at trial, this preserved, nonconstitutional error was harmless because defendant has not met his burden to show that the error resulted in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

Defendant next asserts that the trial court erred by scoring 10 points for offense variable nine (OV 9). We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (citations omitted). "Scoring decisions for which there is any evidence in support will be upheld." *Id*., quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). MCL 777.39(1)(d) provides that zero points should be scored under OV 9 if there are fewer than two victims. Under MCL 777.39(1)(c), 10 points shall be scored for OV 9 when there are two to nine victims. In determining the correct number of points to be scored, the trial court is to "[c]ount each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a). In the present case, the trial court concluded:

> The Court will grant the prosecutor's motion to change it to ten points, gentlemen. I've revisited the testimony of Dwight Jones, who's one of the neighbors about – to which, excuse me, [the prosecutor] refers. And I think the most relevant bit of his testimony is he says this. He said that Patricia Jones was right there, and that he pulled her to the ground when he saw these – when he saw this crime being committed. And so that I think attests to the fact that he believed that at least they were in a zone of danger. And I think that's enough to sustain the scoring here.

Based on the record evidence identified by the trial court, we find no error in the trial court's determination to score 10 points under OV 9.

Defendant next contends that his trial counsel was ineffective in failing to object to the trial court's decision to score OV 6 at 25 points. We disagree. Under MCL 777.36(1)(b), 25 points are properly scored when "[t]he offender had premeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death of great bodily harm was the probable result." Given the testimony that the victim was on the ground and then slumped over as he attempted to run to a car, while shot defendant at the victim and was aiming at the victim's back, the trial court did not err in scoring OV 6 at 25 points.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra